CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, and Notices

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 28 DECEMBER 7, 1994 NO. 49

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DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

The decisions, rulings, notices and abstracts which are published in the CUSTOMS BULLETIN are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Office of Logistics Management, Printing and Distribution Branch, Washington, D.C. 20229, of any such errors in order that corrections may be made before the bound volumes are published.

U.S. Customs Service

Treasury Decisions

(T.D. 94–92)

EXTENSION OF GENERAL MARITIME CORPORATION'S CUSTOMS GAUGER APPROVAL TO THE SITE LOCATED IN HOUSTON, TEXAS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of the extension of General Maritime Corporation's Customs gauger approval to include their Houston, Texas gauging facility.

SUMMARY: General Maritime Corporation, of Stamford, Connecticut, a Customs approved gauger under Section 151.13 of the Customs Regulations (19 CFR 151.13), has been given an extension of its Customs gauger approval to include the Houston, Texas site. Specifically, the extension given to the Houston site will include the approval to gauge petroleum and petroleum products, organic compounds in bulk and liquid form and animal and vegetable oils.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Part 151 of the Customs Regulations provides for the acceptance at Customs Districts of laboratory analyses and gauging reports for certain products from Customs accredited commercial laboratories and approved gaugers. General Maritime Corporation, a Customs commercial approved gauger, has applied to Customs to extend its Customs gauger approval to its Houston, Texas facility. Review of the qualifications of the Houston site shows that the extension is warranted and, accordingly, has been granted.

Location:

General Maritime Corporation's new site is located at 7007 Gulf Freeway, Houston, Texas, 77087.

Approved-Accredited Sites:

General Maritime Corporation has been approved by the U.S. Customs Services at the following locations: Stamford, Connecticut; and Houston, Texas.

EFFECTIVE DATE: October 28, 1994

FOR FURTHER INFORMATION CONTACT: Ira S. Reese, Chief, Technical Branch, Office of Laboratories and Scientific Services, U.S. Customs Service, 1301 Constitution Ave., NW, Washington, DC 20229 at (202) 927–1060.

Dated: November 1, 1994.

GEORGE D. HEAVEY,
Director,
Office of Laboratories and Scientific Services.

[Published in the Federal Register, November 25, 1994 (59 FR 60681)]

(T.D. 94–93)

LICENSE CANCELLATION

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: Notice is hereby given that, pursuant to 19 CFR 111.51(a), the following Customs broker license has been cancelled due to the death of the broker. This license was issued in the New York region.

Customs broker	*License No.*
Louis Jean Noens	12662

Dated: November 18, 1994.

PHILIP METZGER,
Director,
Office of Trade Operations.

[Published in the Federal Register, November 25, 1994 (59 FR 60682)]

(T.D. 94–94)

LICENSE CANCELLATION

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: Notice is hereby given that, pursuant to 19 CFR 111.51(a), the following Customs broker license has been cancelled without prejudice, effective May 2, 1994. This license was issued in the Los Angeles District.

Customs broker	*License No.*
Jack Matsukawa	4131

Dated: November 21, 1994.

PHILIP METZGER,
Director,
Office of Trade Operations.

[Published in the Federal Register, November 29, 1994 (59 FR 61029)]

CORRECTION

19 CFR Part 175

(T.D. 94–88)

DECISION FOLLOWING A PETITION BY DOMESTIC INTERESTED PARTIES CONCERNING THE LOCATION AND METHOD OF COUNTRY OF ORIGIN MARKING FOR IMPORTED CAST IRON SOIL PIPES; CORRECTION

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final interpretive rule; correction.

SUMMARY: This document corrects two errors in the decision published on November 15, 1994, in the Federal Register (59 FR 58771) concerning the location and method of country of origin marking of cast iron soil pipes. Firstly, the document corrects the effective date of the marking requirements set forth in the document. The marking requirements set forth in the decision shall become effective as to merchandise entered or withdrawn from warehouse for consumption after December 23, 1994. Secondly, the document referred to the method of marking on

the sample pipe as die stamping when the actual method of marking on the sample pipe was cast-in-mold.

FOR FURTHER INFORMATION CONTACT: Robert Dinerstein, Office of Regulations and Rulings, (202) 482–7010.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On November 15, 1994, a document was published in the Federal Register (59 FR 58771) giving notice that Customs has made a determination pursuant to a petition filed by domestic interested parties that cast iron soil pipes like the samples submitted to Customs and that are subject to the requirements of section 304(c), Tariff Act of 1930, as amended are not legibly marked in a conspicuous location to indicate their country of origin by die stamping the letters covered by tar at the edge or lip of the pipe. Die stamping was not the actual method of marking on the samples. Accordingly, this correction document remedies that error by correctly describing the method of marking as cast-in-mold. This correction does not change the conclusion in the decision that the marking on the sample pipe was neither legible nor in a conspicuous location.

The decision published in the Federal Register on November 15 also incorrectly set forth the effective date of the marking requirements set forth in the decision. Instead of stating that the effective date is a date 30 days after the date of publication of such notice to the petitioner in the CUSTOMS BULLETIN, as required by § 175.22, Customs Regulations (19 CFR 175.22), the effective date set forth in the document incorrectly was 30 days after the date of publication of the decision in the Federal Register. The decision was published in the CUSTOMS BULLETIN on November 23, 1994. Accordingly, the correct effective date is December 23, 1994. The marking requirements set forth in the decision published on November 15, 1994 in the Federal Register (59 FR 58771) as T.D. 94–88 concerning cast iron soil pipe shall become effective as to merchandise entered or withdrawn from warehouse for consumption on December 23, 1994. After that date, cast iron soil pipe like the samples submitted to Customs pursuant to the domestic interested party petition entered for consumption or withdrawn from warehouse for consumption and not marked to indicate their country of origin consistent with the November 15 decision and other marking requirements of the Tariff Act and Customs Regulations shall be assessed marking duties.

Dated: November 21, 1994.

HAROLD M. SINGER,
Chief,
Regulations Branch.

[Published in the Federal Register, November 29, 1994 (59 FR 60892)]

U.S. Customs Service

General Notices

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, November 22, 1994.

The following documents of the United States Customs Service, Office of Commercial Operations, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

REVOCATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF ELECTRONIC CURRENCY EXCHANGE RATE DISPLAY BOARDS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling pertaining to the tariff classification of electronic currency exchange rate display boards. Notice of the proposed revocation was published October 19, 1994, in the CUSTOMS BULLETIN, Volume 28, Number 42.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after February 6, 1995.

FOR FURTHER INFORMATION CONTACT: Larry Ordet, Metals and Machinery Classification Branch, (202) 482–7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On October 19, 1994, Customs published a notice in the CUSTOMS BULLETIN, Volume 28, Number 42, proposing to revoke New York Ruling

Letter (NY) 856403, issued on October 9, 1990, concerning the tariff classification of electronic currency exchange rate display boards under subheading 8543.80.90 (now, 8543.80.75), Harmonized Tariff Schedule of the United States (HTSUS), which provides for other electrical machines and apparatus, having individual functions, not specified or included elsewhere in this chapter. No comments were received. Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking NY 856403 to reflect the proper classification of the display boards under subheading 8531.20.00, HTSUS, which provides for electric sound signaling apparatus; indicator panels incorporating liquid crystal devices (LCD's) or light emitting diodes (LED's). Headquarters Ruling Letter 957078 revoking NY 856403 is set forth in Attachment A to this document.

Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: November 21, 1994.

MARVIN M. AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE.
Washington, DC, November 21, 1994.

CLA–2 CO:R:C:M 957078 LTO
Category: Classification
Tariff No. 8531.20.00

MR. WILLIAM B. ABOTT
ABOTT ASSOCIATED
195 Hudson Street
New York, NY 10013

Re: Electronic currency exchange rate board; HQs 083609, 086032, 088225, 950407, 955448; NY 848860; NY 856403 *revoked;* subheading 8543.80.90; section XVI, note 4.

DEAR MR. ABOTT:

This is in reference to NY 856403, issued to you on October 9, 1990, which concerned the classification of electronic currency exchange rate board (model Ratex–1826) under the Harmonized Tariff Schedule of the United States (HTSUS). This is a reconsideration of NY 856403. Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. No. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed revocation of NY 856403 was published October 19, 1994, in the CUSTOMS BULLETIN, Volume 28, Number 42.

Facts:

The articles in question are electronic currency exchange rate boards. The boards use light emitting diode (LED) displays to indicate foreign currency exchange rates to customers in banks, hotels, airports, money exchange release stores, etc. The model in question, the RATEX 1826, has two columns ("WE BUY AT," "WE SELL AT") and 18 rows (listing the names of the relevant countries). The boards are imported with infrared remote control keyboards which are used to change the boards' rates.

In NY 856403, the boards (with remote control keyboards) were held to be classifiable under subheading 8543.80.90 (now, 8543.80.75), HTSUS, which provides for other electrical machines and apparatus, having individual functions, not specified or included elsewhere in this chapter.

Issue:

Whether the electronic currency exchange rate boards are classifiable as indicator panels incorporating liquid crystal devices (LCD's) or light emitting diodes (LED's) under subheading 8531.20.00, HTSUS.

Law and Analysis:

The General Rules of Interpretation (GRI's) to the HTSUS govern the classification of goods in the tariff schedule. GRI 1 states in pertinent part that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes * * *."

The subheadings at issue are as follows:

8531	Electric sound or visual signaling apparatus (for example, bells, sirens, indicator panels, burglar or fire alarms), other than those of heading 8512 or 8530; parts thereof:
8531.20.00	**Indicator panels incorporating liquid crystal devices (LCD's) or light emitting diodes (LED's) (2.7% *ad valorem*)**
* * * * * * *	
8543	Electrical machines and apparatus, having individual functions, not specified or included elsewhere in this chapter; parts thereof:
	Other machines and apparatus:
	Other:
8543.80.90	**Other (3.9% *ad valorem*)**

The Harmonized Commodity Description and Coding System Explanatory Notes (EN) constitute the Customs Co-operation Council's official interpretation of the Harmonized System. While not legally binding, the ENs provide a commentary on the scope of each heading of the Harmonized System, and are generally indicative of the proper interpretation of these headings. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

EN 85.31, pg. 1381, states that heading 8531, HTSUS, "covers all electrical apparatus used for signalling purposes, whether using sound for the transmission of the signal (bells, buzzers, hooters, etc.) or using visual indication (lamps, flaps, illuminated numbers, etc.), and whether operated by hand (e.g., door bells) or automatically (e.g., burglar alarms)." The heading covers 'signaling' indicator panels which "are used (e.g., in offices, hotels and factories) for calling personnel, indicating where a certain person or service is required, indicating whether a room is free or not. They include:"

(1) xxx

(2) **Number indicators**. The signals appear as illuminated figures on the face of a small box * * *.

(3)–(5) xxx

(6) **Station indicating panels** for showing the times and platforms of trains.

(7) **Indicators for race courses, football stadiums, bowling alleys, etc.**

EN 85.31, pg. 1381–2 [emphasis in original].

In HQ 086032, dated January 17, 1990, we considered the classification of message display centers, which were used to advertise merchandise, state greetings, and to generally attract a person's attention to a particular store or service, or to the message display itself. The displays included a computer program which allowed the user to create full color animation, graphics and text. In finding that the displays were not covered by heading 8531, HTSUS, we stated as follows:

> [T]he message display centers perform a function which is different than that of signalling equipment. Although the instant merchandise can flash graphics or anima-

> tion to call a person's attention to the display, its primary purpose is to convey a *substantive* message; this function is more than that of signalling equipment which is designed to provide a signal to a viewer who normally will instantaneously understand the meaning of the signal [underlining in original].

We then held that the displays were classifiable under subheading 8543.80.90, HTSUS. *See also* HQ 955448, dated February 23, 1994; NY 848860, dated February 2, 1990.

The electronic currency exchange rate boards are not "moving" message displays, nor do they display full color animation or graphics. While they arguably convey a substantive "message," it is the type of "message" contemplated by heading 8531, HTSUS.

In HQ 088225, dated January 31, 1991, we considered the classification of Electronic Shelf Tags, which acted as illuminated numerical displays for grocery store products' price information. The Shelf Tags visually signaled certain data in numerical form to customers. We held that, according to EN 85.31, number indicators, such as the Shelf Tags, were classifiable as visual signaling apparatus under subheading 8531.20.00, HTSUS.

The electronic currency exchange rate boards use LED displays to indicate foreign currency exchange rates to customers in banks, hotels, airports, money exchange release stores, etc. The limited information supplied by the electronic currency rate exchange boards is similar to that supplied by the Electronic Shelf Tags of HQ 088225, and similar to that supplied by indicating panels of EN 85.31 for showing the times and platforms of trains.

Moreover, the method used by the electronic currency exchange rate boards to supply information is similar to that used by stadium scoreboards. Recently, in HQ 955448, dated February 23, 1994, we stated that the indicators for football stadiums covered by heading 8531, HTSUS, are devices "which show numbers in correspondence with such limited language as 'time outs remaining,' 'quarter,' 'home' and 'visitor,' and 'time remaining.'" The electronic currency exchange rate boards are signs which show numbers in correspondence with such limited language as "WE BUY AT" and "WE SELL AT," along with rows listing the names of the relevant countries. Accordingly, the electronic currency rate boards are classifiable under heading 8531, HTSUS.

With regard to the infrared remote control keyboards that are imported with the boards, note 4 to section XVI, HTSUS, provides as follows:

> Where a machine (including a combination of machines) consists of individual components (whether separate or interconnected by piping, by transmission devices, by electric cables or by other devices) intended to contribute together to a clearly defined function covered by one of the headings in chapter 84 or chapter 85, then the whole falls to be classified in the heading appropriate to that function.

The electronic currency exchange rate boards and infrared remote control keyboards, which are used to change the boards' rates, contribute together to a clearly defined function described by heading 8531, HTSUS. Thus, they are a "functional unit," and the boards and keyboards are classifiable together under subheading 8531.20.00, HTSUS. *See* HQ 950407, dated November 15, 1991; HQ 083609, dated June 6, 1989.

As stated above, the boards and infrared remote control keyboards were held to be classifiable under heading 8543, HTSUS, which provides for electrical machines and apparatus, not specified or included elsewhere. As these boards are described in heading 8531, HTSUS, they cannot be classified under heading 8543, HTSUS. It is therefore necessary to revoke NY 856403.

Holding:

The electronic currency exchange rate boards (and remote control keyboards) are classifiable under subheading 8531.20.00, HTSUS. The corresponding rate of duty for articles of this subheading is 2.7% *ad valorem*. Accordingly, NY 856403 is revoked.

In accordance with section 625, this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

MARVIN M. AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

REVOCATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF SURGICAL MICROSCOPES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling pertaining to the tariff classification of surgical microscopes. Notice of the proposed revocation was published on October 19, 1994, in the CUSTOMS BULLETIN.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after February 6, 1995.

FOR FURTHER INFORMATION CONTACT: Robert Altneu, Office of Regulations and Rulings, Metals and Machinery Classification Branch, (202) 482–7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On October 19, 1994, Customs published a notice in the CUSTOMS BULLETIN, Volume 28, Number 42, proposing to revoke Headquarters Ruling Letter (HQ) 954362, issued on June 30, 1993, by Customs Headquarters, in which certain surgical microscopes were classified under subheading 9018.90.20, HTSUS, which provides for other optical instruments used in surgical sciences. The only comment received in response to the notice disagreed with Customs determination. However, it did not set forth a rationale for the position upon which we can comment.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking HQ 954362 to reflect the proper classification of the surgical microscopes under subheading 9011.10.80, HTSUS, as other compound optical microscopes. HQ 956638 revoking HQ 954362 is set forth in the Attachment to this document.

Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: November 21, 1994.

MARVIN M. AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, November 21, 1994.
CLA–2 CO:R:C:M 956638 RFA
Category: Classification
Tariff No. 9011.10.80

MR. CHRIS WALLACE
JAGRO AIR SERVICES, INC.
AIRPORT INDUSTRIAL OFFICE PARK
145th Avenue & Hook Creek Boulevard
Building #C–5D
Valley Stream, NY 11581

Re: Moeller microsurgical surgical microscope; compound optical microscope; EN 90.11; heading 9018; HQs 085754, 088121, 954640; HQ 954362, revoked.

DEAR MR. WALLACE:

This is in reference to HQ 954362, issued to you on June 30, 1993, on behalf of Moeller Microsurgical, Inc., in which the tariff classification of a surgical microscope was determined under the Harmonized Tariff Schedule of the United States (HTSUS). Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. No. 103–182, 107 Stat. 2057, 2186 (1993)(hereinafter, "section 625"), notice of the proposed revocation of HQ 954362 was published on October 19, 1994, in the CUSTOMS BULLETIN, Volume 28, Number 42. The only comment received in response to the notice disagreed with the proposal, but did not set forth a rationale for the position upon which we can comment. Our decision in this matter is set forth below.

Facts:

The subject merchandise consists of a binocular surgical microscope, used by surgeons when operating on a very small area of the body. The microscope contains double eyepieces and objectives with independent light paths, and thus creates a three-dimensional image. The merchandise possesses a microscope arm, with a light source built into the arm. The microscope may be mounted to a ceiling or to a floor stand, and the arm has free-floating movement capability in all directions.

The subheadings under consideration are as follows:

9011.10:	Compound optical microscopes, including those for photomicrography, cinemicrography or micro projection * * *: [s]tereoscopic microscopes:
9011.10.40	Provided with the means for photographing the image * * *
	Goods classifiable under this provision have a general, column one rate of duty of 4.9 percent *ad valorem*.
9011.10.80	Other * * *
	Goods classifiable under this provision have a general, column one rate of duty of 9 percent *ad valorem*.
9018	Instruments and appliances used in medical, surgical * * * sciences, including scintigraphic apparatus, other electro-medical apparatus and sight-testing instruments* * *:
9018.90.20	Other instruments and appliances and appliances and parts and accessories thereof: [o]ptical instruments and appliances * * *: [o]ther * * *.
	Goods classifiable under this provision have a general, column one rate of duty of 10.0 percent *ad valorem*.

Issue:

Whether the ophthalmic surgical microscope is classifiable as a compound optical microscope or as a surgical microscope under the HTSUS?

Law and Analysis:

Classification of merchandise under the HTSUS is in accordance with the General Rules of Interpretation (GRI's). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes.

In HQ 954362, dated June 30, 1993, Customs classified the surgical microscopes, as other optical instruments used in surgical science under subheading 9018.90.20, HTSUS. Customs based this decision upon the Harmonized Commodity Description and Coding System Explanatory Notes (ENs) to heading 9011, HTSUS. The ENs constitute the Customs Cooperation Council's official interpretation of the HTSUS. While not legally binding, the ENS provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the interpretation of these headings. *See* T.D. 89–80, 54 FR 35127, 35128 (August 23, 1989). In part, EN 90.11, pages 1475–1476, states that:

> * * * the compound optical microscope of this heading has a second stage of magnification for the observation of an already magnified image of the object.

A compound optical microscope normally comprises:

> (I) An optical system consisting essentially of an objective designed to produce a magnified image of the object, and an eyepiece which further magnifies the observed image. The optical system usually also incorporates provision for illuminating the object from below (by means of a mirror illuminated by an external or an integral light source), and a set of condenser lenses which direct the beam of light from the mirror on to the object.
>
> (II) A specimen stage, one or two eyepiece-holder tubes (according to whether the microscope is the monocular or binocular type), and an objective-holder (generally revolving).
>
> * * * This heading covers microscopes as used by amateurs, teachers, etc., and those for industrial use or for research laboratories * * *.

After citing EN 90.11, Customs determined that the subject microscope did not meet the definition because: it did not have a second stage of magnification; it was used to perform microsurgery on a human body, and not used to study and observe objects for laboratory research or industrial purposes.

Customs has since learned that the surgical microscope does meet the definition for compound optical microscopes for heading 9011, HTSUS, because it has a second stage of magnification for the observation of an already magnified image of an object. EN 90.18, pages 1487–1488, states in pertinent part:

> This heading covers a very wide range of instruments and appliances which, in the vast majority of cases, are used only in professional practice (e.g., by doctors, surgeons, dentists, veterinary surgeons, midwives), either to make a diagnosis, to prevent or treat an illness or to operate, etc. * * *
>
> The heading does not cover:
>
> * * * * * * *
>
> (ij) Microscopes, etc., of heading 90.11 or 90.12.

Because the subject merchandise meets the definition of compound optical microscopes covered under heading 9011, HTSUS, classification under heading 9018, HTSUS, is precluded.

The only remaining issue is whether the subject microscopes are provided with the means for photographing the image. Customs has consistently determined that microscopes capable of photomicrography, but which were imported without the device for photographing an image, cannot be considered to be "provided with a means for photographing the image". *See* HQ 954640, dated October 25, 1994; HQ 088121, dated February 26, 1991; HQ 085754, dated December 26, 1989. According to the invoices, the subject merchandise was imported without the means for photographing the images. Therefore, we find that the surgical microscopes are to be classified as compound optical microscopes, provided without the means for photographing the image, under subheading 9011.10.80, HTSUS.

Holding:

Under the authority of GRI 1, the surgical microscope is provided in heading 9011, HTSUS It is classifiable under subheading 9011.10.80, HTSUS, which provides for: "[c]ompound optical microscopes, including those for photomicrography, cinemicrography or micro projection * * *: [s]tereoscopic microscopes: [o]ther * * *." Goods classifiable under this provision have a general, column one rate of duty of 9 percent *ad valorem*.

HQ 954362, dated June 30, 1993, is revoked. In accordance with section 625, this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN. Publication of

rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations [19 CFR 177.10(c)(1)].

MARVIN M. AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

PROPOSED REVOCATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF PLASTIC PIPETTES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of tariff classification ruling letters.

SUMMARY: Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke two rulings pertaining to the tariff classification of plastic pipettes. Comments are invited on the correctness of the proposed rulings.

DATE: Comments must be received on or before January 6, 1995.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1301 Constitution Avenue, NW, (Franklin Court), Washington, DC 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, NW, Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: David W. Spence, Metals and Machinery Classification Branch, (202) 482–7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke two rulings pertaining to the tariff classification of plastic pipettes under the Harmonized Tariff Schedule of the United States (HTSUS).

Classification of merchandise under the HTSUS is in accordance with the General Rules of Interpretation (GRI's). GRI 1 provides that classi-

fication is determined according to the terms of the headings and any relative section or chapter notes.

In NY 874506, dated May 20, 1992, and NY 882589, dated March 10, 1993, the Area Director of Customs, New York Seaport, held that plastic pipettes were classifiable under subheadings 3926.90.90 (the 1992 precursor to subheading 3926.90.95, HTSUS) and 3926.90.95, HTSUS, respectively, which provide for: "[o]ther articles of plastics and articles of other materials of headings 3901 to 3914: [o]ther: [o]ther."

It is now Customs position that the self-adjustable plastic pipettes, which are comprised of mechanical objects such as plungers and pistons, are classifiable under subheading 8479.89.90, HTSUS, which provides for: "[m]achines and mechanical appliances having individual functions, not specified or included elsewhere in this chapter; parts thereof: [o]ther machines and mechanical appliances: [o]ther: [o]ther."

Chapter 39, note 2(o), HTSUS, states that "[t]his chapter does not cover: (o) Articles of section XVI (machines and mechanical or electrical appliances)." Therefore, because the pipettes are classifiable under chapter 84, HTSUS, and because they are mechanical appliances, they are precluded from classification under chapter 39, HTSUS.

Customs intends to revoke NYs 874506 and 882589 to reflect the proper classification of the plastic pipettes under subheading 8479.89.90, HTSUS.

Before taking this action, consideration will be given to any written comments timely received. NY 874506 is set forth in Attachment A to this document; NY 882589 is set forth in Attachment B to this document; proposed HQ 957302, revoking NY 874506, is set forth in Attachment C to this document; and proposed HQ 957301, revoking NY 882589, is set forth in Attachment D to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: November 17, 1994.

MARVIN M. AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, May 20, 1992.

CLA39:S:N:N3G:221 874506
Category: Classification
Tariff No. 3926.90.9010

MR. IGOR GURO
4477 Seneca Drive
Okemos, MI 48864

Re: The tariff classification of plastic microdosers from Russia.

DEAR MR. GURO:

In your letter received in this office on May 11, 1992, you requested a tariff classification ruling.

The plastic microdosers or micropipettes are used in laboratory procedures to transfer precise amounts of liquids from one vessel to another. When the pipette's plunger is pushed down, air is expelled from the tip of the pipette. Releasing the plunger then draws fluid into the tip. The fluid is expelled when the plunger is pressed again.

The applicable subheading for the microdosers will be 3926.90.9010, Harmonized Tariff Schedule of the United States (HTS), which provides for other articles of plastics * * * laboratory ware. The rate of duty will be 80 percent *ad valorem*.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, March 10, 1993

CLA–2–39:S:N:N6:221 882589
Category: Classification
Tariff No. 3926.90.9510

MR. CHARLES M. COLEMAN
COLEMAN LABORATORIES CORP.
958 Washington Road
Pittsburgh, PA 15228

Re: The tariff classification of plastic pipettes from Poland.

DEAR MR. COLEMAN:

In your letter dated January 29, 1993, you requested a tariff classification ruling.

The pipettes are used to measure and dispense liquids. and are used in the Laboratory.

The applicable subheadings for the pipettes will be 3926.90.9510, Harmonized Tariff Schedule of the United States (HTS), which provides for other articles of plastics * * * laboratory ware. The rate of duty will be 5.3 percent *ad valorem*.

Articles classifiable under subheading 3926.90.9510, HTS, which are products of Poland, are entitled to duty free treatment under the Generalized System of Preferences (GSP) upon compliance with all applicable regulations.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC

CLA–2 CO:R:C:M 957302 DWS
Category: Classification
Tariff No. 8479.89.90

MR. IGOR GURO
4477 Seneca Drive
Okemos, MI 48864

Re: Revocation of NY 874506; plastic microdosers or micropipettes; explanatory note 84.79; mechanical appliances; chapter 39, Note 2(o); 3926.90.95.

DEAR MR. GURO:

This is in reference to NY 874506, issued to you on May 20, 1992, by the Area Director of Customs, New York Seaport, concerning the classification of plastic microdosers or micropipettes under the Harmonized Tariff Schedule of the United States (HTSUS). In the course of ruling on the classification of similar merchandise in another case, we have decided that the holding in NY 874506 is incorrect.

Facts:

The merchandise consists of adjustable plastic micropipettes, which are used in laboratory procedures to transfer from one to 2000 microliters of liquids from one vessel to another. The micropipettes are equipped with removable points, the structure of which allows sufficient tightness between the points and the micropipette body without the use of special gaskets. The micropipette possesses a plunger which, when pushed down, expels air from the tip. Releasing the plunger draws fluid into the tip. The fluid is then expelled into a separate vessel by again pushing down on the plunger.

The subheadings under consideration are as follows:

3926.90.95: [o]ther articles of plastics and articles of other materials of headings 3901 to 3914: [o]ther: [o]ther.

The general, column one rate of duty for goods classifiable under this provision is 5.3 percent *ad valorem*.

8479.89.90: [m]achines and mechanical appliances having individual functions, not specified or included elsewhere in this chapter; parts thereof: [o]ther machines and mechanical appliances: [o]ther: [o]ther.

The general, column one rate of duty for goods classifiable under this provision is 3.7 percent *ad valorem*.

Issue:

Whether the plastic micropipettes are classifiable under subheading 3926.90.95, HTSUS, as other articles of plastics, or under subheading 8479.89.90, as other mechanical appliances.

Law and Analysis:

Classification of merchandise under the HTSUS is in accordance with the General Rules of Interpretation (GRI's). GRI 1 provides that classification is determined according to the terms of the headings and any relative section or chapter notes.

In NY 874506, the Area Director of Customs held that the micropipettes were classifiable under subheading 3926.90.90, HTSUS, the 1992 precursor to subheading 3926.90.95, HTSUS.

It is our position that the process of utilizing the plunger to operate the micropipette is one that is mechanical. The user must exert force to push down the plunger to gather the fluid, then release force to hold the liquid in the micropipette.

In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes may be utilized. The Explanatory Notes, although not dispositive or legally binding, provide a commentary on the scope of each heading of the HTSUS, and are generally indicative of the proper interpretation of these headings. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989). In part, Explanatory Note 84.79 (p. 1314) states that:

> [t]his heading is restricted to machinery having individual functions, which:
> (a) Is not excluded from this Chapter by the operation of any Section or Chapter Note.
> and (b) Is not covered more specifically by a heading in any other Chapter of the Nomenclature.
> and (c) Cannot be classified in any other particular heading of this Chapter since:
>
> > (i) No other heading covers it by reference to its method of functioning, description or type.
> > and (ii) No other heading covers it by reference to its use or to the industry in which it is employed.
> > or (iii) It could fall equally well into two (or more) other such headings (general purpose machines).
>
> The machinery of this heading is distinguished from the parts of machinery, etc., that fall to be classified in accordance with the general provisions concerning parts, by the fact that it has individual functions.
> For this purpose the following are to be regarded as having "individual functions":
>
> > (A) Mechanical devices, with or without motors or other driving force, whose function can be performed distinctly from and independently of any other machine or appliance * * *.

It is our position that the micropipettes are properly classifiable under subheading 8479.89.90, HTSUS. They are not excluded from chapter 84, HTSUS, by any chapter or section notes; they are not more specifically classifiable in any other chapter of the HTSUS; and they cannot be classified any more specifically in any particular heading of chapter 84, HTSUS. Also, the micropipettes are mechanical devices with individual functions, as they perform independently from any other machine or appliance.

Chapter 39, note 2(o), HTSUS, states that:

> [t]his chapter does not cover:
> (o) Articles of section XVI (machines and mechanical or electrical appliances).

Therefore, because the micropipettes are classifiable under chapter 84, HTSUS, and are mechanical appliances, they are precluded front classification under chapter 39, HTSUS.

Holding:

The plastic micropipettes are classifiable under subheading 8479.89.90, HTSUS, as other mechanical appliances.

Effect on Other Rulings:

NY 874506 is revoked.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT D]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC

CLA-2 CO:R:C:M 957301 DWS
Category: Classification
Tariff No. 8479.89.90

MR. CHARLES M. COLEMAN
COLEMAN LABORATORIES CORP.
958 Washington Road
Pittsburgh, PA 15228

Re: Revocation of NY 882589; plastic pipettes; explanatory note 84.79; mechanical appliances; chapter 39, Note 2(o); 3926.90.95.

DEAR MR. COLEMAN:

This is in reference to NY 882589, issued to you on May 10, 1993, by the Area Director of Customs, New York Seaport, concerning the classification of plastic pipettes under the Harmonized Tariff Schedule of the United States (HTSUS). In the course of ruling on the classification of similar merchandise in another case, we have decided that the holding in NY 882589 is incorrect.

Facts:

The merchandise consists of adjustable plastic pipettes, which are used in laboratory procedures to transfer from 0.1 to 5000 microliters of liquids from one vessel to another. The pipettes are equipped with removable and disposable points, which prevent direct carryover from sample to sample. The pipette possesses a plunger which, when pushed down, expels air from the tip. Releasing the plunger draws fluid into the tip. The fluid is then expelled into a separate vessel by again pushing down on the plunger. A direct-drive micrometer controls the volume measured. Precision pistons are used to guarantee accurate performance throughout each volume range.

The subheadings under consideration are as follows:

3926.90.95: [o]ther articles of plastics and articles of other materials of headings 3901 to 3914: [o]ther: [o]ther.

The general, column one rate of duty for goods classifiable under this provision is 5.3 percent *ad valorem*.

8479.89.90: [m]achines and mechanical appliances having individual functions, not specified or included elsewhere in this chapter; parts thereof: [o]ther machines and mechanical appliances: [o]ther: [o]ther.

The general, column one rate of duty for goods classifiable under this provision is 3.7 percent *ad valorem*.

Issue:

Whether the plastic pipettes are classifiable under subheading 3926.90.95, HTSUS, as other articles of plastics, or under subheading 8479.89.90, as other mechanical appliances.

Law and Analysis:

Classification of merchandise under the HTSUS is in accordance with the General Rules of Interpretation (GRI's). GRI 1 provides that classification is determined according to the terms of the headings and any relative section or chapter notes.

In NY 882589, the Area Director of Customs held that the pipettes were classifiable under subheading 3926.90.95, HTSUS.

It is our position that the process of utilizing the plunger to operate the pipette, and the use of pistons to control accuracy, is one that is mechanical. The user must exert force to push down the plunger to gather the fluid, then release force to hold the liquid in the pipette.

In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes may be utilized. The Explanatory Notes, although not dispositive or legally binding, provide a commentary on the scope of each heading of the HTSUS, and are generally indicative of the proper interpretation of these headings.

See T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989). In part, Explanatory Note 84.79 (p. 1314) states that:

> [t]his heading is **restricted to** machinery having individual functions, which:
> (a) Is not excluded from this Chapter by the operation of any Section or Chapter Note.
> and (b) Is not covered more specifically by a heading in any other Chapter of the Nomenclature.
> and (c) Cannot be classified in any other particular heading of this Chapter since:
> (i) No other heading covers it by reference to its method of functioning, description or type.
> and (ii) No other heading covers it by reference to its use or to the industry in which it is employed.
> or (iii) It could fall equally well into two (or more) other such headings (general purpose machines).
>
> The machinery of this heading is distinguished from the parts of machinery, etc., that fall to be classified in accordance with the general provisions concerning parts, by the fact that it has individual functions.
>
> For this purpose the following are to be regarded as having "individual functions":
> (A) Mechanical devices, with or without motors or other driving force, whose function can be performed distinctly from and independently of any other machine or appliance * * *.

It is our position that the pipettes are properly classifiable under subheading 8479.89.90, HTSUS. They are not excluded from chapter 84, HTSUS, by any chapter or section notes; they are not more specifically classifiable in any other chapter of the HTSUS; and they cannot be classified any more specifically in any particular heading of chapter 84, HTSUS. Also, the pipettes are mechanical devices with individual functions, as they perform independently from any other machine or appliance.

Chapter 39, note 2(o), HTSUS, states that:

> [t]his chapter does not cover:
> (o) Articles of section XVI (machines and mechanical or electrical appliances).

Therefore, because the pipettes are classifiable under chapter 84, HTSUS, and are mechanical appliances, they are precluded from classification under chapter 39, HTSUS.

Holding:

The plastic pipettes are classifiable under subheading 8479.89.90, HTSUS, as other mechanical appliances.

Effect On Other Rulings:

NY 882589 is revoked.

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED MODIFICATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF PROPELLER CIRCULATORS USED IN PULP-MAKING PROCESS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of propeller circulators, which are used to reduce stock consistency by mixing stock and dilution water in the pulp-making process. Comment invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before January 6, 1995.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1301 Constitution Avenue, NW, (Franklin Court), Washington, DC 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, NW, Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Larry Ordet, Metals and Machinery Classification Branch, (202) 482–7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of propeller circulators.

In Headquarters Ruling Letter (HQ) 950352, issued on January 8, 1992, propeller circulators, which are used to reduce stock consistency by mixing stock and dilution water in the pulp-making process, were classified under subheading 8439.91.10, Harmonized Tariff Schedule of the United States (HTSUS), which provides for parts of machinery for making pulp of fibrous cellulosic materials. HQ 950352 is set forth in Attachment A to this document.

Customs Headquarters is of the opinion that the propeller circulators are classifiable, according to GRI 2(a), as machinery for making pulp of fibrous cellulosic material under subheading 8439.10.00, HTSUS, and

intends to modify HQ 950352 to reflect the proper classification of the propeller circulators under this subheading. Proposed HQ 956831 modifying HQ 950352 is set forth in Attachment B to this document. HQ 956831 concerns the classification of horizontal chest agitators used in the pulp-making process. Like the propeller circulators, the chest agitators consist of a shaft, shaft sealing and impellers, but are imported without motors.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: November 17, 1994.

MARVIN M. AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, January 8, 1992.

CLA–2 CO:R:C:M 950352 LTO
Category: Classification
Tariff No. 8439.91.10 and 8424.90.90

District Director of Customs
Charleston, South Carolina

Re: Protest No. 1601–0–000267; propeller circulators and dilution nozzles; EN 84.24; EN 84.39; HQ 085842; *A. N. Deringer, Inc. v. United States*; 8439.10.00; 8439.91.90; 8479.90.80.

DEAR SIR:

This protest concerns the tariff classification of propeller circulators and dilution nozzles under the Harmonized Tariff Schedule of the United States (HTSUS). The circulators and the nozzles were liquidated at the port of Charleston under subheading 8479.90.80, HTSUS, which provides for "[m]achines and mechanical appliances having individual functions, not specified or included elsewhere in this chapter; parts thereof * * * [p]arts * * * [o]ther." The protestant contends that the propeller circulator should be classified under subheading 8439.10.00, HTSUS, which provides for " * * * [m]achinery for making pulp of fibrous cellulosic material," and that the dilution nozzle should be classified under subheading 8439.91.90, HTSUS, " * * * [p]arts * * * [o]f machinery for making pulp of fibrous cellulosic materials * * * [o]ther."

Facts:

The propeller circulator is a component of a high consistency, downflow bleach tower. Bleach towers are used during the process of making cellulosic pulp. Pulp, which is usually brown in color, must undergo bleaching to be made into white paper. In a bleach tower, pulp stock is combined with chemicals and heat to brighten the pulp fibers which are a component of the stock. The propeller circulator is used in the dilution zone of the bleach tower to ensure a thorough agitation of the stock with dilution water so that the stock consistency is reduced from 10–12 percent to 3–4 percent. This reduction is necessary so that the bleach chemicals can be removed from the stock by a separate machine known as a stock washer.

The circulator is made of steel and is composed of a shaft and several propeller-like blades. The shaft passes through an opening in the side of the bleach tower (a seal prevents leakage around the shaft opening) and is powered by an electric motor and v-belt transmission which are located on the outside of the bleach tower. The circulators are imported without their motors.

The dilution nozzle is also used in the dilution zone of the bleach tower. The nozzle is one of the components of the water distribution system within a bleaching tower. The other components are: a filtrate chest (water reservoir), a pump, piping, and the flow control valves. The product is designed specifically to be used in diluting pulp with dilution liquid.

The principal parts of the nozzle are the spring housing, the inlet housing and the nozzle head. Fitted between the spring housing and the inlet housing is a membrane which steers the nozzle head.

Issue:

What is the proper classification for the propeller circulators and the dilution nozzles under the HTSUS?

Law and Analysis:

The General Rules of Interpretation (GRI's) to the HTSUS govern the classification of goods in the tariff schedule. GRI 1 states in pertinent part that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes * * *."

1. *Propeller Circulator:*

Heading 8439, HTSUS, provides for "[m]achinery for making pulp of fibrous cellulosic material or for making or finishing paper or paperboard (other than the machinery of heading 8419); parts thereof." The Harmonized Commodity Description and Coding Explanatory Note (EN) 84.39, pg. 1227, states that this heading "covers machinery for making fibrous cellulosic pulp from various cellulosic materials (wood, esparto grass, straw, rags, old rope, waste paper, etc.) whether the pulp is for paper or paperboard making or for other purposes * * *." Bleach towers are used during the process of making cellulosic pulp. Pulp, which is usually brown in color, must undergo bleaching to be made into white paper. In a bleach tower, pulp stock is combined with chemicals and heat to brighten the pulp fibers which are a component of the stock. Thus, the bleach towers would be classifiable under Heading 8439, HTSUS.

Subheading 8439.91, HTSUS, provides for "[p]arts * * * [o]f machinery for making pulp of fibrous cellulosic materials." The propeller circulator is a component of the high consistency downflow bleach towers, which are classifiable under Heading 8439, HTSUS. The propeller circulator is used in the dilution zone of the bleach tower to ensure a thorough blending of the pulp stock with dilution water so that the stock consistency is reduced from 10–12 percent to 3–4 percent. The circulator is a part of machinery for making pulp of fibrous cellulosic materials, and is classifiable under subheading 8439.91, HTSUS. Thus, the only issue with regard to the propeller circulator that remains is whether it can be considered a "stock-treating part."

Subheading 8439.91.10, HTSUS, provides for "[p]arts * * * [o]f machinery for making pulp of fibrous cellulosic materials * * * [b]ed plates, roll bars and other stock-treating parts." In *A.N. Deringer, Inc. v. United States*, C.D. 2681, the court stated that "[t]he least that can be expected of a process to qualify it as 'treatment' is some action upon stock which changes its form or composition." While considering the classification of a stock agitator, the court concluded that where stock undergoes no change in composition due to the action of a propeller used for agitation, the propeller is not a stock-treating part, holding:

> The stock agitator is a stirring device, resembling a hollow airplane propeller, which is used in storage tanks to maintain the homogeneity of the stock. The testimonial record * * * discloses that the function of the agitator is to maintain homogeneity and not to induce it. We are, therefore, of the opinion that the 'stirring' performed by the agitator is not 'stock-treatment' in the tariff sense (emphasis in original).

The circulator at issue, like the stock agitator, is used in a tank-like article known as a bleach tower. Unlike the agitator for a storage tank involved in *A.N. Deringer*, the circulator does not maintain homogeneity—rather, it actually functions to mix the stock and dilution water in a process which reduces stock consistency from 10–12 percent to 3–4 percent. Thus, it effects the consistency of the stock, and is a stock-treating part of the bleach tower. Accordingly, the article is classifiable under subheading 8439.91.10, HTSUS.

2. *Dilution Nozzle:*

Heading 8424, HTSUS, provides for "[m]echanical appliances (whether or not hand operated) for projecting, dispersing or spraying liquids or powders; fire extinguishers, whether or not charged; spray guns and similar appliances; steam or sand blasting machines and similar jet projecting machines; parts thereof." EN 84.24, pg. 1188, states that this heading covers "machines and appliances for projecting, dispersing or spraying steam, liquids or solid materials (e.g., sand, powders, granules, grit or metallic abrasives) in the form of a jet, a dispersion (whether or not in drips) or a spray." The dilution nozzle functions as part of a water distribution system within a bleaching tower to project, disperse or spray liquids. Water or filtrate is pumped from a reservoir through piping and dispersed into the bleach tower through the dilution nozzles by means of control valves.

In HQ 085842, dated March 13, 1990, sprinkler heads for use in ceiling-installed fire extinguishing sprinkler systems were classified under subheading 8424.90.90, HTSUS, which provides for parts of mechanical appliances for projecting, dispersing or spraying liquids. The sprinkler head operated in the system to spray water over the interior of a room to extinguish fires. The system was mechanically operated while the sprinkler head, by itself, was not. Like the sprinkler head, which was a component of the fire extinguishing sprinkler system, the dilution nozzle functions as a component of a water distribution system within the bleach tower system.

Chapter 84, Note 2 requires that articles which can be classified in Heading 8424, HTSUS, as well as in Heading 8439, HTSUS, the provision claimed by the protestant, must be classified in the former heading. Thus, the articles in question are classifiable under subheading 8424.90.90, HTSUS.

Holding:

The propeller circulators are classifiable under subheading 8439.91.10, HTSUS, which provides for "[m]achinery for making pulp of fibrous cellulosic material or for making or finishing paper or paperboard (other than the machinery of heading 8419); parts thereof * * * [p]arts * * * [o]f machinery for making pulp of fibrous cellulosic materials * * * [b]ed plates, roll bars and other stock-treating parts." The corresponding rate of duty for articles of this subheading is 4.7% *ad valorem*.

The dilution nozzles are classifiable under subheading 8424.90.90, HTSUS, which provides for "[m]echanical appliances (whether or not hand operated) for projecting, dispersing or spraying liquids or powders; fire extinguishers, whether or not charged; spray guns and similar appliances; steam or sand blasting machines and similar jet projecting machines; parts thereof * * * [p]arts * * * [o]ther." The corresponding rate of duty for articles of this subheading is 3.7% *ad valorem*.

Since reclassification and reappraisement of the merchandise as indicated above would result in no net duty reduction, you are instructed to deny the protest in full. A copy of this decision should be attached to the Customs Form 19 and provided to the protestant as part of the notice of action on the protest.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE
Washington, DC

CLA–2 CO:R:C:M 956831 LTO
Category: Classification
Tariff No. 8439.10.00 and 8479.82.00

MR. ROBERT L. EISEN
MS. KAREN BYSIEWICZ
COUDERT BROTHERS
1114 Avenue of the Americas
New York, NY 10036–7794

Re: Agitators (horizontal and vertical); HQ 950352 *modified;* HQ 950445; NY 866505; Additional U.S. Rule of Interpretation 1(a); GRI 2(a); EN 84.39.

DEAR MR. EISEN AND MS. BYSIEWICZ:

This is in response to your letter of June 30, 1994, on behalf of Ahlstrom Process Equipment, Inc., to Customs in New York, requesting the classification of chest agitators and vertical agitators under the Harmonized Tariff Schedule of the United States (HTSUS). Your letter was referred to this office for a response.

Facts:

The articles in question are horizontal and vertical agitators. The "Salomix Chest Agitators" [hereinafter, "chest agitators"] come in two basic models: the "Type STG" and "Type STB." The chest agitators consist of a shaft, shaft sealing, impellers, bearings and motor. The shaft is protected by a conical frame, and lies in a horizontal position once the agitator is installed in a tank. The main difference between the STG and STB is that the former possesses a gearbox design, while the latter has a v-belt drive. All parts coming in contact with stock are made of acid-proof steel. At importation, neither model will contain a motor, and will either be fully assembled when imported, or assembled in all respects except that the impellers may be unattached from the shaft.

The chest agitators are designed for use in the pulp-making process. They perform three main functions: (1) they keep pulp stock in motion to prevent sedimentation or changes in consistency of the stock; (2) they produce a homogeneous mixture of stock when different stock types, coloring agents or chemicals are added; and (3) they dilute stock with water to create a different consistency of stock. All of these functions are performed on stock or to produce stock. The chest agitators (and vertical agitators, when used in a pulp or papermaking mill) are used prior to the processing of pulp into paper in the headbox, and after the headbox, to return damaged paper to pulp.

The "Salomix Vertical Agitators" [hereinafter "vertical agitators"] consist of a modular system of components, including a shaft, impellers, bearing housing and motor. The vertical agitators have a vertical free shaft—the shaft is placed vertically in the tank which contains the agitator. The vertical agitators may be equipped with either a gearbox design, or v-belt drive.

The vertical agitators will be imported without motors, either fully assembled or with the impellers and/or shaft components unassembled to facilitate transport and handling. You state that the vertical agitators are used to perform the same functions as the chest agitators, and that they are principally used to make cellulosic pulp.

Issue:

Whether the chest agitators and vertical agitators are classifiable as machinery for making pulp of fibrous cellulosic material under subheading 8439.10.00, HTSUS.

Law and Analysis:

The General Rules of Interpretation (GRI's) to the HTSUS govern the classification of goods in the tariff schedule. GRI 1 states in pertinent part that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes * * *." The Harmonized Commodity Description and Coding System Explanatory Notes (EN) constitute the Customs Co-operation Council's official interpretation of the Harmonized System. While not legally binding, the ENs provide a commentary on the scope of each heading of the Harmonized System, and are generally

indicative of the proper interpretation of these headings. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

You contend that the chest agitators and vertical agitators are classifiable under subheading 8439.10.00, HTSUS, which provides for machinery for making pulp of fibrous cellulosic material. EN 84.39, pg. 1227, states that heading 8439, HTSUS, "covers machinery for making fibrous cellulosic pulp from various cellulosic materials * * * whether the pulp is for paper or paperboard making or for other purposes * * *."

1. *Chest Agitators:*

The physical characteristics and design features demonstrate that the chest agitators are used only for processing pulp. They have a horizontal shaft, common to the pulp industry, whereas agitators used in other industries usually have vertical shafts. Moreover, the chest agitators have propellers and shafts developed specifically for the agitation of fibrous stock that agitators for other industries would not have. The propellers are sturdily built to withstand the agitation of pulp, which consists of a thick suspension of wood fibers and water. They also possess a smooth form that prevents fibers from adhering to sharp corners of the propeller blades. Additionally, the chest agitators have a shaft that is protected by a conical frame, a design feature unique to the pulp industry, which serves to prevent shaft failures and vibrations caused by large volumes of stock impacting the agitator shaft during use. Finally, all parts of the chest agitator coming in contact with the pulp are made of acid-proof steel, a feature adapted to the pulp industry because of the chemicals used in the pulp-making process.

It is our opinion that the chest agitators are principally used for making pulp. *See* Additional U.S. Rule of Interpretation 1(a); HQ 950445, dated February 3, 1992. Accordingly, they are classifiable under heading 8439, HTSUS, which provides for machinery for making pulp of fibrous cellulosic material, and parts thereof.

In HQ 950352, dated January 8, 1992, Customs considered the classification of propeller circulators used in bleach towers. These circulators were composed of a steel shaft, several propeller-like blades, shaft sealing, a v-belt transmission, and were imported without a motor. We determined that the propeller circulators were parts of bleach towers and were classifiable under subheading 8439.91, HTSUS, which provides for stock-treating parts of machinery for making pulp of fibrous cellulosic materials, because they reduced stock consistency by mixing stock and dilution water.

The propeller circulators, like the chest agitators, are independent machines for the production of pulp stock. Both have their own power source and perform distinct operations on stock. Both are used at various stages in the pulp-making process. For example, the chest agitators are used prior to the processing of pulp into paper in the headbox, and after the headbox, to return damaged paper to pulp. It is therefore our opinion that the chest agitators (and propeller circulators) are pulp-making machinery, rather than a part of such machinery, and HQ 950352 will be modified accordingly.

At importation, neither model of the chest agitator will contain a motor, and will either be fully assembled when imported, or assembled in all respects except that the impellers may be unattached from the shaft.

GRI 2(a) provides as follows:

> Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as entered, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this rule), entered unassembled or disassembled.

The incomplete chest agitators, imported without motors, consist of a shaft, shaft sealing, impellers and bearings. It is our opinion that, as imported, the chest agitators have the essential character of a complete agitator. Accordingly, the incomplete chest agitators are classifiable, according to GRI 2(a), under heading 8439.10.00, HTSUS, which provides for machinery for making pulp of fibrous cellulosic material. Moreover, they remain classifiable under this provision, even if imported with the impeller detached from the shaft.

2. *Vertical Agitators:*

You contend that the vertical agitators are used to perform the same functions as the chest agitators, and are principally used to make cellulosic pulp. You also claim that the vertical agitators will be sold only to the pulp and paper-making industry. However, sales literature supplied with your request indicates that the vertical agitators are capable of use in a variety of equipment, including storage tanks, production vessels, reactors, dis-

solvers and fermenters. In addition, the literature indicates that they can be supplied with various types of impellers, such as a paddle, propeller, turbine, dissolver or anchor, depending on the process requirements. The following process applications mentioned in the literature are general in nature:

—to suspend solids, liquids or gases;
—to dissolve solids in liquids;
—to equalize concentrations;
—to blend miscible liquids;
—to keep slurries homogenous;
—to prevent sedimentation.

You contend that the vertical agitators are similar to the chemical mixer of NY 866505, dated September 16, 1991, which was classified under subheading 8439.10.00, HTSUS. The vertical agitators are not similar to chemical mixers used in the pulp bleaching process, such as the mixers of NY 866505, as such mixers are not capable of performing the various functions ascribed to the vertical agitators.

It is our opinion that the vertical agitators—general purpose agitators—are not principally used for making pulp. *See* Additional U.S. Rule of Interpretation 1(a). The vertical agitators, even if sold only to pulp and paper mills, can be used in mill applications not directly involved in the manufacture of pulp, such as chemical recovery and wastewater treatment. The vertical agitators lack any special features, such as the specially designed acid proof steel propellers and conical frames found on the chest agitators, which distinguish them from agitators in general. Accordingly, the vertical agitators cannot be classified under heading 8439, HTSUS, and are classifiable, according to GRI 2(a), under subheading 8479.82.00, HTSUS, which provides for mixing, kneading, crushing, grinding, screening, sifting, homogenizing, emulsifying or stirring machines, not specified or included elsewhere in chapter 84.

Holding:

The Salomix Chest Agitator is classifiable under subheading 8439.10.00, HTSUS, which provides for machinery for making pulp of fibrous cellulosic material. The corresponding rate of duty for articles of this subheading is *free*.

The Salomix Vertical Agitator is classifiable under subheading 8479.82.00, HTSUS, which provides for mixing, kneading, crushing, grinding, screening, sifting, homogenizing, emulsifying or stirring machines, not specified or included elsewhere in chapter 84. The corresponding rate of duty for articles of this subheading is 3.7% *ad valorem*.

Effect on Other Rulings:

HQ 950352, dated January 8, 1992, is modified.

JOHN DURANT,
Director,
Commercial Rulings Division.

MODIFICATION OF CUSTOMS RULING LETTER RELATING TO THE COUNTRY OF ORIGIN OF SHEETS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of a country of origin ruling.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying a ruling pertaining to the country of origin of certain sheets. Notice of the proposed modification was published October 12, 1994, in the CUSTOMS BULLETIN, Volume 28 Number 41.

EFFECTIVE DATE: Merchandise entered, or withdrawn from warehouse, for consumption on or after February 6, 1995.

FOR FURTHER INFORMATION CONTACT: Phil Robins, Textiles Classification Branch, (202) 482–7029.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On October 12, 1994, Customs published a notice in the CUSTOMS BULLETIN, Volume 28 Number 41, proposing to modify New York Ruling Letter (NY) 878608, issued October 6, 1992, by the Area Director of Customs, New York Seaport, concerning the country of origin of sheets. That ruling held the country of origin of certain fitted sheets was the country where the sheets were cut on two sides and pockets at each of the four corners were cut, sewn, and closed with elastic. One comment was received. Our response to that comment is reflected in the Customs Headquarters Ruling Letter (HRL) 956030 modifying NY 878608, a copy of which is set forth in Attachment A to this document.

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), this notice advises interested parties that Customs is modifying NY 878608 to reflect that the country of origin of fitted sheets which are only cut on two sides is the country in which the fabric was formed.

Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.19(c)(1)).

Dated: November 22, 1994.

JOHN DURANT,
Director,
Commercial Rulings Division.

[Attachment]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC

CLA–2 CO:R:C:T 956030 PR
Category: Classification

MR. DARRYL GOLDEN
NORMAN KRIEGER, INC.
P.O. Box 92599
Los Angeles, CA 90009

Re: Modification of New York Ruling Letter (NY) 878608, concerning the country of origin of sheets.

DEAR MR. GOLDEN:

This is in reference to New York Ruling Letter (NY) 878608, issued October 6, 1992, by the Area Director of Customs, New York Seaport, addressed to your company, concerning the country of origin of sheets. We have reviewed that ruling and determined that it is in error. Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter section 625), notice that Customs was proposing to modify NY 878608 was published October 12, 1994, in the CUSTOMS BULLETIN, Volume 28 Number 41. This modifies that ruling.

Facts:

According to the information contained in NY 878608, fitted bed sheets are made in Kenya from fabric woven, bleached, dyed or printed, and finished in Pakistan. In Kenya, the fabric is stitched on two sides and each of the four corner pockets are finished by cutting, sewing, and adding elastic. The ruling does not state whether the fabric is shipped to Kenya in rolls or in cut pieces, but since the ruling does state that the fabric "is stitched on two sides" in Kenya, we assume that the fabric is exported from Pakistan in roll form and is cut to length (but not width) in Kenya.

Issue:

The issue presented is which country, Pakistan or Kenya, is the country of origin of the subject sheets.

Law and Analysis:

Section 12.130, Customs Regulations (19 CFR 12.130) provides, in pertinent part, that a textile or textile product which consists of materials processed in more than one foreign country shall be a product of the country where it last underwent a substantial transformation. A textile or textile product will be considered to have undergone a substantial transformation if it has been transformed *by means of substantial manufacturing or processing operations* into a new and different article of commerce.

In applying the above criteria, Customs has taken the view that when fabric formed in one country is converted to fitted sheets in a second country, in order for the second country to be the country of origin of the sheets, among other things, all four sides of the sheets must be cut and hemmed in that second country (see *e.g.* HQ 955780, dated May 17, 1994; HQ 954872, dated December 2, 1993; HQ 954710, dated October 7, 1993). Since the fitted sheets which were the subject of NY 878608 were only cut and hemmed on two sides in Kenya, the processing in that country did not constitute a substantial transformation.

We recognize that cutting fabric on all four sides may not reflect the usual method of producing bed sheets. However, manufacturing bed sheets by cutting the fabric on two or three sides does not, in our view, involve sufficient processing to satisfy the requirement of *substantial manufacturing or processing operations.*

It has been pointed out to us that other Customs rulings exist which are in agreement with NY 878608. We were not aware of those rulings at the time the proposal to modify NY 878608 was prepared. Customs will move as expeditiously as possible to modify or revoke those rulings and any others we find which do not agree with this ruling.

Holding:

The country of origin of the fitted sheets described in NY 878608 is Pakistan. NY 878608, dated October 6, 1992, is hereby modified to reflect this holding.

Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

JOHN DURANT,
Director,
Commercial Rulings Division.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 94–175)

NSK LTD. AND NSK CORP., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND FEDERAL-MOGUL CORP., AND TORRINGTON CO., DEFENDANT-INTERVENORS

Court No. 93–08–00469

(Dated November 14, 1994)

ORDER

TSOUCALAS, *Judge:* In light of the decision (September 30, 1994) and mandate (October 21, 1994) of the United States Court of Appeals for the Federal Circuit, Appeal Nos. 93–1525, 93–1534, and of the mandate (October 20, 1994) of the United States Court of Appeals for the Federal Circuit, Appeal No. 94–1103, remanding this case with instructions, it is hereby

ORDERED that this case is remanded to the Department of Commerce, International Trade Administration ("Commerce") to recalculate the final dumping margin at issue after deducting direct selling expenses incurred on U.S. sales from the exporter's sales price, rather than adding those expenses to foreign market value; and it is further

ORDERED that Commerce will report the results of this remand to the Court within sixty (60) days of the entry of this order.

(Slip Op. 94–176)

RHP BEARINGS, ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND FEDERAL-MOGUL CORP., AND TORRINGTON CO., DEFENDANT-INTERVENORS

Court No. 93–08–00470

(Dated November 14, 1994)

ORDER

TSOUCALAS, *Judge:* In light of the decision (September 30, 1994) and mandate (October 21, 1994) of the United States Court of Appeals for the Federal Circuit, Appeal Nos. 93–1525, 93–1534, and of the mandate (October 19, 1994) of the United States Court of Appeals for the Federal Circuit, Appeal Nos. 94–1102, 94–1108, remanding this case with instructions, it is hereby

ORDERED that this case is remanded to the Department of Commerce, International Trade Administration ("Commerce") to recalculate the final dumping margin at issue after deducting direct selling expenses incurred on U.S. sales from the exporter's sales price rather than adding those expenses to foreign market value; and it is further

ORDERED that Commerce will report the results of this remand to the Court within sixty (60) days of the entry of this order.

(Slip Op. 94–177)

KOYO SEIKO CO., LTD. AND KOYO CORP. OF U.S.A., PLAINTIFFS, AND ISUZU MOTORS LTD. AND AMERICAN ISUZU MOTORS, INC., PLAINTIFF-INTERVENORS *v.* UNITED STATES, DEFENDANT, AND TIMKEN CO., DEFENDANT-INTERVENOR

Court No. 90–10–00546

(Dated November 14, 1994)

ORDER

TSOUCALAS, *Judge:* In accordance with the decision (September 30, 1994) and mandate (October 21, 1994) of the United States Court of Appeals for the Federal Circuit, Appeal Nos. 93–1525, 93–1534, reversing and remanding this case with instructions, it is hereby

ORDERED that this case is remanded to the Department of Commerce, International Trade Administration ("Commerce") to recalculate the final dumping margin at issue after deducting direct selling expenses incurred on U.S. sales from the exporter's sales price, rather than adding those expenses to foreign market value; and it is further

ORDERED that Commerce will report the results of this remand to the Court within sixty (60) days of the entry of this order.

(Slip Op. 94–178)

CHINA NATIONAL METAL PRODUCTS IMPORT AND EXPORT CORP. AND SIGMA CORP., PLAINTIFFS *v.* UNITED STATES, AND U.S. DEPARTMENT OF COMMERCE, DEFENDANTS, AND U.S. WATERWORKS FITTINGS PRODUCERS COUNCIL, ET AL., DEFENDANT-INTERVENORS

Court No. 93–09–00655

(Dated November 14, 1994)

ORDER

GOLDBERG, Judge: Upon consideration of Plaintiffs' Consent Motion to Affirm Commerce Department's Remand Determination, and all other pleadings, papers and proceedings herein, it is hereby

ORDERED that Plaintiffs' motion be, and the same hereby is, GRANTED; and it is further

ORDERED that the Commerce Department's remand determination is AFFIRMED; and it is further

ORDERED that the Commerce Department publish an amended antidumping duty order in accordance with the results of the remand determination; and it is further

ORDERED that the appeal is DISMISSED with prejudice, with all parties bearing their own costs; and Final Judgment is entered accordingly

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PUBLIC VERSION

(Slip Op. 94–179)

PAUL T. BENNETT, PLAINTIFF *v.* U.S. SECRETARY OF LABOR, DEFENDANT

Court No. 93–02–00080

[Remand to Department of Labor for further findings.]

(Dated November 18, 1994)

Sidney N. Weiss, Esq., for plaintiff.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Marc E. Montalbine)*, of counsel: *Scott Glabman*, Office of the Solicitor, U.S. Department of Labor for defendant.

OPINION

MUSGRAVE, *Judge:* Plaintiff moves this Court for judgment upon the agency record overturning the determinations of the Department of Labor ("Labor") in this case, and remanding the case to Labor for a new

investigation and determination. Plaintiff contends Labor's negative determination of eligibility for certification for trade adjustment assistance benefits and its negative determination for reconsideration are not supported by substantial evidence on the record and is not otherwise in accordance with law under the Trade Act of 1974 as amended ("the Trade Act"). 19 U.S.C. § 2272 (1988). Labor opposes the motion and requests affirmance of its determinations.

On the basis of the papers submitted herein, the arguments of the parties, the relevant case law and an examination of the administrative record, the Court finds that Labor's determination is not based on substantial evidence on the record and is not in accordance with law. This case is remanded to Labor for further findings.

BACKGROUND[1]

On July 20, 1992, Mr. Bennett and other layed-off workers filed a petition upon behalf of employees of the Garrett Fluid Systems Division of Allied-Signal Aerospace Company in Tempe, Arizona ("Allied-Signal"), requesting certification for trade adjustment assistance benefits pursuant to 19 U.S.C. § 2271. P.R. Document 1–4. According to the petition, the affected workers were machinists who produced "commercial and military aerospace hardware." P.R. Document 2. Petitioners alleged that their jobs had been transferred to Allied-Signal's plant in Singapore. P.R. Document 3. In particular, petitioners claim that the intermediate step of tooling and forging parts which were cast in Tempe, Arizona, was now being performed in Singapore.

In the petition, petitioners listed Mr. Jack Reese, in the Tooling Procurement Department as the person who had knowledge that the jobs had been transferred to Singapore. P.R. Document 2. In addition, one of the petitioners, Mr. Jeffrey Whitehead, provided a letter with additional information which contained a list of people within the company who could verify the petitioners' claim. P.R. Document 3.

In August 1992 an investigation was conducted by Labor. Labor first investigated whether any of Allied-Signal's customers had switched their purchases of aerospace equipment from Allied-Signal's Tempe plant to its Singapore plant. In order to make such a determination, Labor surveyed 11 major customers of Allied-Signal. Each of the customers surveyed responded that they had not increased their purchases of imported aerospace hardware in 1991 as compared to 1990 or in the first half of 1992 as compared to the first half of 1991. P.R. Document 18 and C.R. Document 33–66.

Next, Labor investigated petitioners claim that production work had been shifted from Allied-Signal's Tempe plant to its Singapore plant. Labor requested that Allied-Signal complete a questionnaire concerning its business operations including its sales, production, and employment for the period under investigation. C.R. Document 20–32. In

[1]The Court quotes without attribution the uncontroverted facts in the record. Citations to documents contained in the public record of this administrative review are designated "P.R." Citations to documents contained in the confidential record of this administrative review are designated "C.R."

response to the questionnaire, Allied-Signal submitted data reporting sales, production, and employment for both the Tempe and Singapore plants. *Id.* This information exhibited that from 1990 to 1991 and from the first half of 1991 to the first half of 1992, sales and production at both the Tempe and Singapore plants declined. C.R. Document 20–21.[2] In addition, the data showed that while the number of hourly employees at the Tempe plant declined during the same period, the number of hourly employees at the Singapore plant also declined. C.R. Document 32.[3]

On September 19,1992, Labor issued a negative determination regarding Allied-Signal employees' eligibility to apply for worker adjustment assistance. P.R. Document 70–71. Labor determined that an increase in imports had not "contributed importantly" to the workers' separation from Allied-Signal. P.R. Document 71; *see* 19 U.S.C. § 2271(b)(1). Labor stated:

> U.S. imports of parts for military aircraft decreased in the latest twelve-month period May through April 1991–1992 compared with the same period 1990–1991. A survey conducted by the Department of Labor revealed that the subject firm's major customers did not import aerospace hardware during the period relevant to the investigation.

P.R. Document 71.

On November 9, 1992, petitioners requested that Labor reconsider its negative determination. P.R. Document 76–78. The petitioners reiterated their claim that work was transferred from the Tempe plant to the Singapore plant. P.R. Document 77. Nevertheless, the application for reconsideration was denied on December 4, 1992. P.R. Document 89–91. In its negative determination on reconsideration, Labor stated:

> The "contributed importantly" test is generally demonstrated through a survey of the subject firms customers. The Department's survey shows that the subject firm's major customers did not import aerospace hardware during the period relevant to the investigation.

P.R. Document 90.

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[2]In 1990, the Tempe plant had total sales of | |. In 1991, the Tempe plant's sales declined by | | to a total of | |. C.R. Document 20. In 1990, the Singapore plant had total sales of | |. In 1991, the Singapore plant's sales declined by | | to a total of | |. *Id.* During the first half of 1991, the Tempe plant had total sales of | |. During the first half of 1992, the Tempe plant's sales declined by | | to a total of | |. *Id.* During the first half of 1991, the Singapore plant had total sales of | |. During the first half of 1992, the Singapore plant's sales declined by | | to a total of | |. *Id.*

With respect to production during the period under investigation, Allied-Signal noted the | |. C.R. Document 21. Allied-Signal states that it, therefore, | |. *Id.*

[3]In 1990, the Tempe plant had total hourly employment of | | employees. In 1991, the Tempe plant's hourly employment declined by | | employees to a total of | | employees. C.R. Document 32. In 1990, the Singapore plant had total hourly employment of | | employees. In 1991, the Singapore plant's hourly employment declined by | | employees to a total of | | employees. *Id.* During the first half of 1991, the Tempe plant had a total hourly employment of | | employees. During the first half of 1992, the Tempe plant's hourly employment declined by | | employees to a total of | | employees. *Id.* During the first half of 1991, the Singapore plant had total hourly employment of | | employees. During the first half of 1992, the Singapore plant's hourly employment declined by | | employees to a total of | | employees. *Id.*

Labor relied on a letter dated November 30, 1992, in which Mr. William C. Roche, Allied-Signal's Manager for Compensation and Benefits stated:

> I have spoken with our Manager of Purchasing who informs me that no more than $100,000 worth of production has been shifted to the Singapore facility during 1991 and 1992. Additionally, much of this work was being performed by suppliers outside of our Tempe plant and not Allied-Signal employees.
>
> The total amount shifted equates to approximately 0.02% of our total annual sales. Additionally, you'll recall from the answers we provided in the Information Request package (item 2.b) [C.R. 20] that, while sales where declining for the Tempe plant, they were also declining for the Singapore plant (minus 3.8% and minus 5.8%, respectively).

C.R. Document 87.

Furthermore, Labor stated:

> The findings show that the workers were not separately identifiable by product line and that only an negligible amount of production was shifted to Singapore in the 1991–1992 period and much of the transferred production was performed for the company by outside vendors rather than by employees of the Tempe plant. Findings also show that the Singapore plant had declining sales in 1992 compared to 1991.

P.R. Document 90.

DISCUSSION

In order for Labor to certify a group of workers for adjustment assistance, 19 U.S.C. § 2272 states that:

(a) The Secretary shall certify a group of workers * * * as eligible to apply for adjustment assistance under this part if he determines—

> (1) that a significant number or proportion of the workers in such workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated,
>
> (2) that sales or production, or both, of such firm or subdivision have decreased absolutely, and
>
> (3) that increases of imports of articles like or directly competitive with articles produced by such workers' firm or an appropriate subdivision thereof contributed importantly to such total or partial separation, or threat thereof, and to such decline in sales or production.

(b) For purposes of subsection (a)(3) of this section—

> (1) The term "contributed importantly" means a cause which is important but not necessarily more important than any other cause.

19 U.S.C. § 2271 (a)–(b)(1).

A negative determination by Labor denying certification of eligibility for trade adjustment assistance will be upheld if it is supported by substantial evidence on the record and is otherwise in accordance with law. 19 U.S.C. § 2395 (1988); *See Woodrum v. Donovan*, 5 CIT 191,193, 564 F. Supp. 826, 828 (1983), *aff'd, sub nom. Woodrum v. United States*, 737 F.2d 1575 (Fed. Cir. 1984). The findings of fact by Labor are conclusive if supported by substantial evidence. 19 U.S.C. § 2395(b). Substantial evidence has been held to be more than a "mere scintilla," and must be reasonable enough to support a conclusion. *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 405, 636 F. Supp. 961, 966 (1986) (and cases cited therein), *aff'd*, 810 F.2d 1137 (Fed. Cir. 1987). Additionally, "the rulings made on the basis of those findings [must] be in accordance with the statute and not be arbitrary and capricious, and for this purpose the law requires a showing of reasoned analysis." *International Union v. Marshall*, 584 F.2d 390, 396 n.26 (D.C. Cir. 1978).

This Court has also observed that "because of the *ex parte* nature of the certification process, and the remedial purpose of the trade adjustment assistance program, the Secretary [Labor] is obligated to conduct his investigation with the utmost regard for the interests of the petitioning workers." *Stidham v. Dep't of Labor*, 11 CIT 548, 551, 669 F. Supp. 432, 435 (1987), *citing Abbott v. Donovan*, 7 CIT 323, 327–28, 588 F. Supp. 1438, 1442 (1984).

In accordance with this standard of review, this Court cannot in good conscience affirm a determination on the basis of the administrative record in the case at hand. The administrative record developed during the investigation indicates that Labor's investigative efforts were at best lacking.

Plaintiff claims that this case must be remanded back to Labor so that it can properly investigate this petition and properly fulfill its obligation under the statute. This Court is persuaded by plaintiff's argument.

Labor ignores the fact that plaintiff claims that the jobs were lost to imports *by their company* of tooling and forging of parts which were subsequently integrated into larger components which were later *sold by Allied-Signal to its regular customers.* Allied-Signal's customers could not have known that they were purchasing foreign machined (of U.S. cast) parts because the final-assembled product was marked with U.S. country of origin. P.R. Document 76–77. As a consequence, the data gathered by Labor's survey provides little probative value to show that plaintiffs jobs were not lost to imports. This survey could never have disclosed the actual measure of loss of jobs to imports.

Allied-Signal's response to Labor's questionnaire lacked relevant information pertaining to production. The bulk of the data dealt with sales and employment for the Tempe and Singapore plants. However, as stated above in footnote 2, Allied-Signal noted that [ ]. C.R. Document 21. Allied-Signal stated that it, therefore, [ ]. *Id.* In any event, Labor incorporates into the record the relative employment levels at the Tempe and Singa-

pore plants. Labor obviously includes this data in its negative determinations to rebut plaintiffs claim that their jobs were lost to imports, however, Labor has failed to demonstrate a causal connection between decreased employment and decreased production. In other words, Labor does not delineate the importance of this data as it relates to the decision of whether production decreased or whether increased imports caused plaintiff to lose their jobs. Thus, this comparative analysis by Labor does not make clear or provide sufficient guidance to the Court to determine whether manufacturing jobs were not transferred from Tempe to Singapore.

Furthermore, the data representing a decline in imports was based on the decline in U.S. imports for military aircraft parts in the latest twelve-month period, May through April 1991–1992, compared with the same period in 1990–1991. Although this data is not disputed, plaintiff states that the Garrett Fluid Systems Division primarily manufactures air valve systems for commercial jet engines and general aerospace hardware. Labor, however, based its determination on the figures as provided in broad import data for the imports of military aircraft parts. Despite the fact that military imports decreased, imports of civilian aircraft parts increased during the latest twelve-month period May through April 1991–1992 compared with the same period in 1990–1991. P.R. Document 16. Additionally, no data exists in the record pertaining to Allied-Signal's proportionate sales and production for commercial and military aircraft parts. Such information is pivotal in ascertaining the impact of imports on the loss of plaintiff's jobs.

Lastly, Labor in its negative determinations relied on the statements of Mr. William C. Roche, Compensation and Benefits Manager. However, the record reflects that Labor did not request supporting documentation to substantiate Mr. Roche's statements. This Court has held that conclusory assertions alone are not sufficient for Labor to make an accurate determination. *See Former Employees of General Electric Corp. v. U.S. Department of Labor,* 14 CIT 608, 612–13 (1990). Mr. Roche's unsupported assertions that production was not transferred from the Tempe plant to the Singapore plant cannot be supported on the basis of Mr. Roche's conclusory assertions on this record. In addition, there is no indication in the record that Labor questioned or investigated plaintiff's eye-witness statements and list of witnesses whom plaintiff asserts could verify their claim that the jobs had been transferred to Singapore.

Labor's investigation was cursory at best. While it is true that Labor has considerable discretion in conducting its investigations, and this Court will defer to its choice of reasonable methodologies, Labor must base its determination upon sufficient evidence for a reasonable mind to concur in the result. Here, Labor did not conduct a sufficiently thorough and searching investigation to fully assess plaintiff's claim, especially when viewed in light of the remedial purpose of the statute.

On the facts in the record, neither Labor nor this Court could conclude that foreign imports did not contribute importantly to plaintiff's

layoffs. The record lacks any relevant evidence such that a reasonable mind might accept as adequate to support the negative determination in this case. Therefore, this case must be remanded to Labor for further examination.

CONCLUSION

The Court concludes there is not substantial evidence on the record to support Labor's determination denying eligibility for trade adjustment assistance to plaintiff and that there is good cause to remand this matter to Labor for a new investigation and redetermination in accordance with this opinion. Hence, this action is remanded to Labor, who shall, within sixty days, reevaluate plaintiff's petition in strict accordance with this decision. Remand results shall be tiled with the Court immediately upon the completion of the investigation, but in no event later then ninety days of the issuance of this opinions.

ABSTRACTED CLASSIFICATION DECISIONS

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C94/125 11/15/94 Goldberg, J.	A.B. Dick Company	90-07-00366	408.41, 408.44, etc. Various rates	676.56, 672.52, 676.5650 3.9% 676.5650/912.48 Free 676.5250 4.1¢, 4.3%	Agreed statement of facts	Chicago, IL Toner kits K-62-9700, K-62-7202, K-62-6150, K-62-9880

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